

No. 15998

United States
Court of Appeals
for the Ninth Circuit

JAMES R. YOST,

Appellant,

vs.

ALBERTA G. MORROW,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court
for the District of Idaho,
Southern Division.

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Appeal from the United States District Court
for the District of Idaho,
Southern Division.

In the District Court of the United States in and
for the District of Idaho, Southern Division

No. 3270

JAMES R. YOST,

Plaintiff,

vs.

C. A. BUTCHER and ALBERTA G. MORROW,

Defendants.

AMENDED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial at Boise, Idaho, the 23rd day of October, 1957, Geo. Donart of the firm of Donart & Donart of Weiser, Idaho, appearing as attorney for the plaintiff, and Allan G. Shepard and William R. Padgett, both of Boise, Idaho, appearing as attorneys for the defendants.

Witnesses were sworn and examined and documentary evidence introduced. At the close of the plaintiff's case counsel for the defendant moved for a Judgment of Nonsuit and Dismissal in favor of the defendant Alberta G. Morrow upon the ground that the defendant Morrow received no consideration for the execution of the promissory note in question, which Motion was taken under advisement by the Court and at the close of the defendants' case was again renewed by defense counsel and said Motion was granted and the cause ordered dis-

missed insofar as it affected the said Alberta G. Morrow. After both sides had rested their respective cases the cause was submitted to the Court for consideration and determination.

The Court being fully advised as to the law and the premises hereby makes and enters its Findings of Fact and Conclusions of Law as follows:

I.

That the plaintiff is a resident of and domiciled at the City of Nyssa in the County of Malheur, State of Oregon; that the defendant, C. A. Butcher is a resident of and domiciled at the City of Parma, in the County of Canyon, State of Idaho; that the defendant, Alberta G. Morrow is a resident of and domiciled in the County of Idaho, State of Idaho, and jurisdiction of the above-entitled Court in this action is grounded upon the diversity of citizenship of the parties hereto;

II.

That at Nyssa, Oregon, on or about October 17, 1955, the defendants C. A. Butcher and Alberta G. Morrow, who then and there was and now is a widow, made, executed and delivered to the plaintiff their certain promissory note in writing wherein and whereby they jointly and severally promised and agreed to pay to the order of the plaintiff at Nyssa, Oregon, on or before April 15, 1956, the sum of Seven Thousand Three Hundred (\$7,300.00) Dollars, lawful money of the United States of America, with interest thereon in like lawful money

at the rate of six per cent per annum from the date thereof until paid, which note was in words and figures as follows:

“\$7,300.00

“October 17, 1955.

“On or before April 15, 1956, after date, for value received we promise to pay to the order of James R. Yost at the First National Bank of Portland at Nyssa, Oregon, Seven Thousand Three Hundred and 00/100 Dollars in lawful money of the United States of America, with interest thereon in like lawful money at the rate of 6 per cent, per annum, from date until paid. Interest to be paid at maturity and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like lawful money, as the Court may adjudge reasonable, for attorneys fees to be allowed in said suit or action.

“C. A. BUTCHER,

“ALBERTA G. MORROW.”

That said note was made, executed and delivered by the defendant C. A. Butcher for a valuable consideration; that said note was made, executed and

delivered by the said Alberta G. Morrow without consideration;

III.

That at Nyssa, Oregon, and on or about the 17th day of October, 1955, and coincident with the execution and delivery of said note and to secure the payment of the sums due to become due thereunder according to the terms and tenor thereof, the defendant, C. A. Butcher, who was then and there the owner of the personal property hereinafter described, made, executed, and delivered to the plaintiff his certain indenture of mortgage conditioned upon the payment of said note wherein and whereby he mortgaged to the plaintiff the following described personal property situate in the County of Canyon, State of Idaho, to wit:

- 460 tons of ensilage;
- 39 tons of grain;
- 30 tons of straw;
- 40 tons of hay.

IV.

That said Chattel Mortgage was duly acknowledged by the maker thereof so as to entitle the same to be placed of record and also thereafter on October 20, 1955, filed for record in the office of the County Recorder of Canyon County, Idaho, and appears of record therein as Instrument No. 426919;

V.

That the said Chattel Mortgage contained a clause wherein it was provided that in the event the maker

should fail to pay said promissory note at the time the same should become due the condition of said Chattel Mortgage would become broken and the holder thereof should be entitled to have the same foreclosed; that the said promissory note is now past due and unpaid and although demand has been made upon the defendants to pay the same the defendants have not paid the sums due on the said promissory note, or any part thereof, except the sum of Eight Hundred Seventy-nine (\$879.00) Dollars, which was paid on April 6, 1956, and the sum of One Hundred Sixty-three (\$163.00) Dollars, paid May 24, 1956, and by reason of the failure of said defendants to pay said note when the same became due the condition of said Chattel Mortgage has become broken and the plaintiff is entitled to have the same foreclosed;

VI.

That the plaintiff is now the owner and holder of said Note and Chattel Mortgage and no prior proceedings have been had either at law or in equity for the collection thereof;

VII.

That there is now due, owing and unpaid from the defendant C. A. Butcher to the plaintiff the sum of Six Thousand Two Hundred Fifty-eight (\$6,258.00) Dollars, together with interest thereon at the rate of six per cent per annum from April 6, 1956;

VIII.

That both the note above mentioned and the Chattel Mortgage, so executed by the defendant Butcher in favor of the plaintiff, contained a clause wherein it is provided that if suit or action be instituted to collect said note or foreclose said Chattel Mortgage a reasonable sum should be allowed the plaintiff as attorney's fees for such suit or action; that the sum of Six Hundred (\$600.00) Dollars, is a reasonable sum to be allowed the plaintiff as attorneys fees in this action if the foreclosure of said Chattel Mortgage and collection of said note be not contested; that if the foreclosure thereof or the collection of said note should be contested the sum of Seven Hundred Fifty (\$750.00) Dollars, is a reasonable sum to be allowed the plaintiff as attorneys fees in this action and the plaintiff has become obligated to pay his attorneys a reasonable sum for their services herein rendered and to be rendered;

IX.

That the only portion of said mortgaged chattels now in existence is some spoiled ensilage and the property still in existence and encumbered by said Chattel Mortgage is worthless and the foreclosure thereof would be a useless formality;

X.

That on or about the 15th day of July, 1955, the plaintiff James R. Yost and the defendant C. A. Butcher entered into a valid contract by the terms of which it was agreed that the plaintiff should

deliver to said defendant approximately four hundred (400) head of weaner and yearling cattle on or before November 15, 1955, and that said cattle should be fed and cared for by said defendant at his own expense for a period of one hundred fifty (150) days and that as full and complete compensation for furnishing said feed and caring for and full feeding said cattle and furnishing all facilities therefor the plaintiff should pay to the defendant fifteen cents (15c) per pound for the entire gain per animal so to be fed by the defendant;

XI.

That the defendant was not induced to enter into said contract by any fraud on the part of the plaintiff and the plaintiff did not represent to the defendant that he was the owner of all of said cattle but the defendant well knew at the time said cattle were delivered to him that approximately three hundred (300) head of said cattle were the property of one John Stringer;

XII.

That the defendant Butcher cared for and fed said cattle on his ranch in Canyon County, Idaho, from November 28, 1955, until April 6, 1956, when said cattle were removed by the plaintiff Yost without any protest on the part of the defendant Butcher;

XIII.

That the defendant Butcher was not damaged by the removal of said cattle for the reason that the

price he was receiving for feeding said cattle was less than the necessary and absolute cost of continuing to feed said cattle;

XIV.

That the defendant Butcher became entitled to a credit upon said promissory note for money due him for feeding said cattle in the sum of Eight Hundred Seventy-nine (\$879.00) Dollars, which was credited on April 6, 1956:

From the Foregoing Facts the Court Legally Concludes:

I.

That the above-entitled action insofar as it relates to the defendant Alberta G. Morrow should be dismissed;

II.

That there is due the plaintiff from the defendant Butcher the sum of Six Thousand Two Hundred Fifty-eight (\$6,258.00) Dollars, together with interest thereon at the rate of six per cent per annum from April 6, 1956, together with attorneys fees in the sum of Seven Hundred Fifty (\$750.00) Dollars, and the plaintiff is entitled to judgment against the defendant C. A. Butcher in said amounts;

III.

That while the payment of said sum was originally secured by a Chattel Mortgage, the security has become worthless and it is unnecessary that said Chattel Mortgage be foreclosed.

Let Judgment be entered accordingly.

/s/ EDWARD P. MURPHY,
U. S. District Judge.

March 21, 1958.

[Endorsed]: Filed March 24, 1958.

[Title of Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are the additional portion of the original files designated by the parties:

1. Amended Findings of Fact and Conclusions of Law.
2. Amended Designation of Contents of Record on Appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 24th day of July, 1958.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 15998. United States Court of Appeals for the Ninth Circuit. James R. Yost, Appellant, vs. Alberta G. Morrow, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed July 26, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.